IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

Number 75-776

S. H. DU PUY and LIBERTY MUTUAL INSURANCE COMPANY,

Petitioners,

vs.

DIRECTOR, OFFICE OF WORKMEN'S COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

CARL N. OTJEN
OTJEN, PHILIPP & VAN ERT, S.C.
of Counsel
741 North Milwaukee Street
Milwaukee, Wisconsin 53202
Attorneys for Petitioners

HAMMERSMITH-BREITHAUPT PRINTING CORP., MILWAUKEE, WIS.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioners, S. H. Du Puy and Liberty Mutual Insurance Company, pray that a Writ of Certiorari issue to review the Order and Judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on August 7, 1975, denying the petition to set aside the Decision of the Benefits Review Board, and that on hearing, the Judgment be reversed.

OPINONS BELOW

The Compensation Order of the Administrative Law Judge was not published, but appears as Appendix A, pp. 1a-5a.

The Decision of the Benefits Review Board was not published but appears as Appendix B, pp. 6a-9a. The Order of the Benefits Review Board denying reconsideration was not published, but appears as Appendix C, p. 10a.

The Opinion of the Court of Appeals is reported at 519 F. 2d 536 (Appendix D, pp. 11a-20a). The Denial of Petition for Rehearing is also reported at 519 F. 2d 536 (Appendix E, p. 21a).

JURISDICTION

The Judgment of the Court of Appeals (Appendix D, pp. 11a-20a) was entered on August 7, 1975. A Petition for Rehearing, timely filed, was denied on September 3, 1975 (Appendix E, p. 21a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. §901 *et. seq.* preclude settlements, and approvals thereof, in death benefit claims arising under the Act?

2. If the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. §901 *et. seq.* permits settlements in death benefit claims, is approval thereof limited to the Deputy Commissioner?

3. Whether Section 28(a) of the Longshoremen's and Harbor Worker's Compensation Act as amended in 1972, 33 U.S.C. §928(a), should be given prospective application only and not affect attorney's fees incurred after the effective date of the Amendment where the cause of action arose before such Amendment.

STATUTES INVOLVED

The statutes involved are Sections 8, 19, and 28 of the Longshoremen's and Harbor Worker's Compensation Act, as amended October 27, 1972, Pub. L. 92-567, 86 Stat. 1264, 1261 and 1259. These sections are reprinted in pertinent part in Appendix F, pp. 22a-23a.

STATEMENT OF FACTS

On November 6, 1972, Oscar Allen, a grain trimmer employed by Petitioner S. H. Du Puy Company, was injured aboard a ship docked at a grain terminal in Milwaukee, Wisconsin, Mr. Allen, a Jehovah's Witness, refused blood transfusions which to a reasonable medical certainty would have saved his life according to the stipulated testimony of Mr. Allen's physician presented to the administrative law judge (App. p. 3a). On November 11, 1972, Mr. Allen died.

Petitioner Liberty Mutual Insurance Company, insurance carrier for S. H. Du Puy, gave notice it would controvert the case. The widow of the deceased, Dorothy Allen, made claim for death compensation through the Office of Workmen's Compensation Programs in Chicago, Illinois.

After an informal conference between Deputy Commissioner Byrne, claimant and Liberty Mutual, formal

administrative hearing was scheduled for October 18, 1973 before Administrative Law Judge Burnstein. Before this hearing, the parties informed the Judge that a stipulated settlement had been worked out. The Administrative Law Judge issued his Decision (App. A, p. 5a) and ordered a lump sum payment to claimant with claimant's attorney's fees to be paid from the compensation award. Respondent, Director, Office of Workmen's Compensation Programs, Department of Labor, appealed this compensation Order to the Benefits Review Board (BRB) pursuant to 33 U.S.C., 921(b). The BRB vacated the Compensation Order on June 17, 1974 (App. B, pp. 8a-9a) stating that a lump sum settlement could only be approved by the Deputy Commissioner. (App. B, p. 8a) Petitioners request for reconsideration of its Decision and for consideration of the attorney's fees issue raised on the appeal was denied by the BRB Order of July 10, 1974. (App. C, p. 10a)

Petitioners sought review in the Court of Appeals for the Seventh Circuit pursuant to 33 U.S.C. §921(c) as amended 1972, 86 Stat. 1261, 1262. The case was argued and submitted on April 7, 1975. On August 7, 1975, the court denied the petition to set aside the BRB Decision, reluctantly, concluding that neither the Deputy Commissioner nor the Administrative Law Judge had authority to approve the settlement (App. D, p. 19a). A timely petition for rehearing was made on August 21, 1975, and denied on September 3, 1975 (App. E, p. 21a). Because of the court's decision, the issue regarding attorney fees was not decided.

I. UNLESS REVIEWED BY THIS COURT, BENEFICIARIES IN LONGSHOREMAN DEATH CLAIMS WILL FOREVER BE REQUIRED TO "ROLL THE DICE".

A. Department's Action Following the Decision of the Court Below has Precluded Further Possibility of Legal Review.

Prior to the decision of the Seventh Circuit Court of Appeals in this case, the Deputy Directors of the Department of Labor, Office of Workmen's Compensation, had, under Section 8(i)(A) of the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. §908(i)(A), approved a significant number of compromise settlements involving claims by surviving beneficiaries of deceased longshoremen and harbor workers.

Following the lower court's decision, however, the Department ordered that no further compromise agreements in controverted death benefit cases may be approved. This means, that every claiming survivor of a deceased employee covered by the Longshoremen's Act shall receive either the entire statutory benefit — or absolutely nothing. It also means that there will be no subsequent opportunity for this Court to review a lower court's decision involving the questions of authority to approve death benefit settlements. All future cases will involve only litigated facts and law as there will be no possibility for "approved compromise settlements".

Consideration of these questions is important because the Department has shown its willingness to exercise its authority to approve lump sum settlements, but for the decision of the court below.

B. The Important Questions Raised Here Probably Cannot Reach This Court in any Other Pending Case.

Petitioners know of no other case presently pending in other Circuits where there will be consideration of the basis for the Seventh Circuit's decision so as to lead to potential review by this Court.

Another Circuit Court of Appeals could well reach an opposite conclusion from that rendered by the court below so as to create a conflict between Circuits and, therefore, review by this Court. If, as we believe, there are no similar cases pending, the action of the Department referred to in the preceding section of this Petition, will preclude such questions from reaching other Circuits. It is therefore particularly important that the Supreme Court give consideration to the decision reached in this particular case.

The questions involved in this case are ones of general importance. The decision rendered affects all longshoremen and other harbor workers as well as their employers and insurance carriers. The decision can also affect other provisions and benefits granted under the Act.

The power to compromise disputed claims is of vital importance to the power and effective administration of the Act.

If certiorari is not granted in this case, Deputy Commissioners or judges and the courts, will not be in a position to allow and approve compromise settlements in proper cases involving death claims from this point forward.

II. SEVENTH CIRCUIT'S DECISION ON TWO IMPORTANT QUESTIONS OF FIRST IMPORTANCE WILL BECOME "LAW OF THE LAND" UNLESS REVIEWED BY THIS COURT.

An important question briefed and argued before the Seventh Circuit Court involved whether a hearing examiner—as well as any Court—had the right to approve a compromise settlement after the case rose above the level of the Deputy Commissioner. The court below, however, determined that no one had the right to approve a lump sum compromise settlement in a death claim, thereby creating an even more important question to be determined by this Court. The basis of the lower court's decision was not argued in the briefs or oral argument originally submitted to it.

Prior to this time claimants, employers, insurers, their respective counsel, and the Labor Department had all believed — and acted on the belief — that the Secretary of Labor, prior to the Amendment to the Act of 1972 and the Deputy Commissioner, subsequent to 1972, had the power to approve lump sum settlements in death benefit cases pursuant to Section 8(i)(A) of the Act, 33 U.S.C. §908(i)(A).

The 1972 Amendments gave to hearing examiners (now administrative law judges) "all powers, duties, and responsibilities vested by [the Act] on October 27, 1972, in the Deputy Commissioners with respect to 'all hearings respecting a claim arising under the Act, 33 U.S.C. §919 (d). All hearings are now to be conducted in accordance with Section 554 of the Administrative Procedure Act, 5 U.S.C. §554. Petitioners contend in the proceeding below

that Section 19(d) of the Amended Act, 33 U.S.C. §919 (d) gave the administrative law judge the authority to approve lump sum settlements of controverted death claims arising under the Act. This authority was believed by all to be at least vested in the Deputy Commissioner.

III. STATUS OF DEATH CASES PREVIOUSLY SETTLED WITH DEPARTMENT'S APPROVAL IS IN DOUBT.

The decision of the Seventh Circuit Court at least creates a cloud upon, if it does not in fact void, all of the previously settled death claims approved by the Department of Labor. The decision leaves the door open for any of the parties to previous settlement to re-open the question of whether benefits were or were not payable under the Act. Re-opening and trial of such cases, as might be required under this decision, could well result in financial hardship to survivors who have received and spent the proceeds of the settlement and who might thereafter be required to repay those amounts.

IV. IF LEFT TO STAND, THE LOWER COURT'S DECISION WILL OF NECESSITY INEVITABLY LEAD TO INCREASED LITIGATION.

Administrative agencies and courts are already overburdened with litigated cases. The lower court's decision, if allowed to stand, will increase that burden. By precluding settlements in appropriate death claims, the decision will force the parties to litigate many claims that should be settled. The death claims can involve fact and legal questions, medical questions and combinations of all three. In cases where the claimant has a "good" — but not perfect — case, the insurance carrier might well be inclined

to make a substantial settlement. On the other hand, if it is an all or nothing situation as the court below requires, the insurance carrier would have nothing to lose by litigating it. On the other hand, where the claimant has a weak case, he or she has nothing to lose through litigation where minimal settlements are precluded — as they now are.

The decision below by increasing litigation in death claims will correspondingly serve to delay the payment of benefits to surviving beneficiaries in disputed cases where settlement would otherwise quickly terminate the dispute and result in prompt payment of an agreed amount.

V. THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS IS CONTRARY TO THE PRINCIPLES OF STATUTORY CONSTRUCTION IMPLICIT IN PRIOR DECISIONS OF THIS COURT.

The decision of the Court below turns on the strict interpretation given by that court to the words "injured employee entitled to compensation" in Section 8(i)(A) as excluding from settlement considerations beneficiaries of an employee in death claims. Apparently, the Court below was of the view that the Act is to be strictly confined to its "precise statutory limitations" (App. D, p. 19a), a view clearly erroneous in light of the decisions of this Court.

In *Voris v. Eikel,* 346 U.S. 328, 98 L. Ed. 5, 74 S. Ct. 88 (1953), this Court stated that with respect to statutory construction, the Longshoremen's Act "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." (346 U.S.

at 328). Quoted with approval, *Reed v. S. S. Yaka,* 373 U.S. 410, 10 L. Ed. 2d 448, 83 S. Ct. 1349 (1963), rehearing denied 375 U.S. 872, 11 L. Ed. 2d 101, 84 S. Ct. 27.

Consideration of other decisions of this Court clearly demonstrates that this Court will not blindly adhere to the superficial meaning of provisions of the Act which achieve a result which is harsh, absurd or incongruous.

The rule that a test of reasonableness is to be applied in interpreting a statute was again applied in *Reed v. S. S. Yaka, supra,* when this Court held that the exclusion liability of the employer to the employee in Section 905 was not to be applied in those circumstances where a longshoreman was employed directly by the shipowner and the employee was to have the same rights against the shipowner employer as did an employee of an independent contracting stevedore against a third party shipowner. In construing this statutory language, Mr. Justice Black said "Only blind adherence to the superficial meaning of a statute" would permit the Court to deny the injured longshoreman the same rights which a longshoreman employed by an independent contracting stevedore had against the vessel on which the injury occurred. (373 U.S. at p. 415) To rule any other way "would produce a harsh and incongruous result, one out of keeping with the dominant intent of Congress to help longshoremen. . . Petitioner's need for protection from unseaworthiness was neither more nor less than that of a longshoreman working for a stevedoring company. As we said in a slightly different factual context, 'All were subjected to the same danger. All were entitled to like treatment under law.' (quoting from *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406, 413, 98 L. Ed. 143, 74 S. Ct. 202 (1953)" 373 U.S. at p. 415.

Likewise, in this case, a dependent of a deceased employee should be entitled to the same treatment as the injured employee. This is particularly true since Congress has never amended the Act to specifically prohibit the Department of Labor from approving lump sum death benefit settlements, despite the longstanding administrative policy of allowing such settlements. To now allow only an employee the opportunity to enter into a settlement, and to preclude a surviving spouse from the same right is a result which is manifestly harsh and injust.

To the effect that this Court will not apply a "literal" construction to a statute so as to give the statute a harsh or unreasonable result see *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp.,* 350 U.S. 124, 100 L. Ed. 133, 76 S. Ct. 232 (1956); *Jackson v. Lykes Bros. Steamship Co., Inc.,* 386 U.S. 731, 18 L. Ed. 2d 488, 87 S. Ct. 1419 (1967); *Czaplicki v. S. S. Hoegh Silvercloud,* 351 U.S. 525, 100 L. Ed. 1387, 76 S. Ct. 946 (1956).

In view of the proper construction that should be given this Act, the decision below should be reviewed because the result reached is harsh, absurd and illogical. The statutory definition of "injury" includes "death," 33 U.S.C. §902(2), and the statutory definition of "compensation", 33 U.S.C. §902(12), includes money payable to dependents of an employee and also funeral benefits. When these definitions are applied to Section 8(i)(A), 33 U.S.C. §908(i)(A), that section would read substantially as follows:

> "Whenever the deputy commissioner determines that it is for the best interest of an 'injured or deceased' employee entitled to the 'money benefits payable to an employee or to his dependents . . . including funeral benefits,' he may approve agreed settlements."

By limiting this section to employees and not other dependents, the court below clearly has reached a result which is not consistent with the liberality of the Act itself. It is harsh because it denies the survivors of an employee the same rights the deceased was given under the Act.

Furthermore, such a result is absurd because it leads to inconsistencies within the Act itself. For example, Section 21(b)(3), 33 U.S.C. §921(b)(3), authorizes the Benefits Review Board "to hear and determine appeals . . . from decisions with respect to claims of employees . . ." If the term "employees" does not include dependents of a deceased employee, then the BRB has no statutory authority to review the order of the administrative law judge. Likewise, the Court below would have no jurisdiction because Section 21, which is the sole source of jurisdiction for the Court below, gives power only to review "a final order of the Board." 33 U.S.C. 921 (c).

One other example will suffice. Section 15(b) provides:

> "(b) No agreement by an employee to waive his right to compensation under this chapter shall be valid." 33 U.S.C. §915(b)

This Section mentions only an employee and is silent respecting a surviving spouse or other beneficiary. If the decision below is allowed to stand, then only an employee, not his beneficiaries, would be prohibited from having their right to compensation and settlement with a surviving spouse could be obtained outside the Act by obtaining a waiver of rights. This would obviate the need for approval by the deputy commissioner, administrative law judge, or anyone else. No act that we know of, including the Longshoremen's Act, permits settlement without approval of some appropriate authority charged with administering or adjudicating claims under the Act.

VI. ALTHOUGH PRESENTED BELOW THE COURT FAILED TO RULE ON ISSUE OF PAYMENT OF ATTORNEY'S FEES.

Although this issue has been raised throughout the appellate procedure at all levels, the Court below failed to determine whether an amendment to a statute (Section 28(a) of the Act, 33 U.S.C. §928(a)) can shift the legal liability for claimant's attorney fees from the claimant to the insurer where injury occurred prior to the amendment and the rights of the parties were established by the earlier law.

CONCLUSION

The decision of the Court below leaves the "harsh, absurd and incongruous" result of remitting all widows, and survivors in disputed death claims "to a roll of the dice, an all or nothing situation." (opinion below, App. D, p. 18a) The action taken by the Department will hereafter preclude the possibility of this serious question being presented to this Court for determination. Under these circumstances it is vitally important that the Court exercise its discretion to hear and determine this case.

Respectfully submitted,

CARL N. OTJEN
OTJEN, PHILIPP &
VAN ERT, S.C.
of Counsel

Attorneys for Petitioners

APPENDIX A

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20210

In the Matter of

MRS. DOROTHY C. ALLEN — Claimant

vs.

S. H. DU PUI COMPANY — Employer

LIBERTY MUTUAL INSURANCE COMPANY — Carrier

Before: EDWIN S. BERNSTEIN
Administrative Law Judge

DECISION AND ORDER

Case No. 73-LHCA-114
(Formerly 10-3392)

Upon consideration of the stipulation entered into between the parties at the hearing held in this case on October 18, 1973, the following Findings of Fact and Award are hereby entered:

FINDINGS OF FACT

(1) The claimant, Dorothy C. Allen, was born on January 18, 1917; resides at 9536 West Lisbon Avenue, in the City and County of Milwaukee, State of Wisconsin; is a housewife by occupation; and is the widow of Oscar H. Allen.

(2) During his lifetime, and on November 6, 1972, Oscar H. Allen was employed as a grain trimmer by S. H. Du Pui Company at the Jones Island Docks in the City and County of Milwauke, State of Wisconsin. On November 6, 1972, Oscar H. Allen was employed aboard a vessel, the S. S. *Martha Hindman,* owned and operated by Hindman Transportation Company, whose offices are located at Owen Sound, Ontario, Canada. That said ship was docked at the Jones Island Docks for the purpose of unloading grain. That on said November 6, 1972, the leg of a grain elevator being lifted out of the hold of said vessel became wedged under a hatch coaming. Oscar H. Allen was in the process of dislodging the leg when one of the vessel's crewmen released a line that was holding the vessel in position, the vessel moved and Oscar H. Allen was wedged between the leg of the grain elevator and the hatch coaming.

(3) That as a result of the accident, Oscar H. Allen suffered severe and internal injuries which were diagnosed at St. Luke's Hospital in Milwaukee, Wisconsin as (a) a focal capsular laceration of the spleen with parenchymal hemorrhage and (b) focal laceration of the small bowel with hemorrhage. The attending physician, Dr. Michael A. Polacek, states that Mr. Allen entered the hospital with "massive abdominal trauma and hemorrhage secondary to same due to a ruptured viscus, small bowel mesentery and spleen."

(4) Oscar H. Allen passed away on November 11, 1972, at St. Luke's Hospital. The death certificate states the cause of death as cardio-pulmonary failure due to anemia following crushing abdominal injuries following bowel resection and splenectomy due to accident—pinned by grain elevator while at work.

(5) The attending physician, Dr. Michael A. Polacek, if called as a witness, would testify that at the time Oscar H. Allen was admitted to the hospital, he was in critical condition because of the massive blood loss and refusal by both the patient and the family to be given needed blood transfusion on the basis of religious preference. That his religious wishes were followed, although several times an attempt was made, both with the family and the patient, to circumnavigate these wishes and to give the patient blood. That the patient succumbed from his injuries on November 11, 1972, five days after the initial trauma and surgery. That said doctor would testify to reasonable medical certainty, although the patient's prognosis was guarded, he would have survived if blood replacement could have been given, and that his recovery prognosis, on the basis of the injury, would have been considered good, although his disability most likely would have exetended two to three months.

(6) Oscar H. Allen, a Jehovah Witness, accepted medical treatment but refused administration of a blood transfusion or transfusions on religious grounds, and that he was conscious and coherent up to within 20 minutes before his demise. That he consistently, during the entire period he was in the hospital, refused to permit blood replacement by means of transfusion.

(7) That the claimant, Dorothy C. Allen, and her two adult daughters, Janice Allen and Phyllis Allen, are also members of the Jehovah Witness faith, and that, if called upon to testify, would testify that they, too, if their consent to a blood replacement by transfusion were needed, would have refused to give such consent on religious grounds.

(8) That at the time of the demise of Oscar H. Allen, claimant, Dorothy C. Allen, was 56 years of age and her life expectancy, according to the American Mortality Table, would be 16.72 years in accordance with Section 314.07 of the Wisconsin Statutes. That, as the widow of Oscar H. Allen, claimant would be entitled to a weekly sum of $36.75. That the annual compensation, based on a weekly sum of $36.75, would be the sum of $1,911.00. The calculation of a lump sum settlement utilized in the American Experience of Five Percent Single Life Table is 10.95 years, and that the total present value of the sum of $36.75, based upon the life expectancy of the claimant, is the sum of $19,291.55.

(9) That the claimant, Dorothy C. Allen, was examined by a physician in behalf of the employer and the carrier; that said physician, if called to testify, would testify that the claimant is suffering from hypertension and diabetes, and that, in his opinion, her life expectancy would be less than that of 16.72 years, based upon the aforesaid life expectancy tables.

(10) That the carrier, in behalf of the employer and with the consent of the employer, has offered the sum of $11,250.00 to the widow in full and final settlement of the widow's compensation death benefit, which said settlement has been accepted by the claimant and approved by the attorneys for the claimant; and I find as

CONCLUSIONS OF LAW

(1) That on November 6, 1972, Oscar H. Allen was employed by a grain trimmer by the employer, S. H. Du Pui Company; and that during the course of his employment, he was severely injured and taken to a hospital where he died five days later.

(2) That the decedent, Oscar H. Allen, received and accepted medical treatment, except for a blood transfusion which he rejected on religious grounds. That such refusal of a blood transfusion was his decision and not the decision of the widow, although she supported his decision.

(3) That Section 9 of the Longshoremen's Act grants a right of action relating to death benefits payable to dependents; that said right is a new cause of action separate and apart from the injured employee's right to compensation; that, as the Longshoremen's Act is remedial, the same should be broadly or liberally interpreted and that any doubt should be resolved in favor of the injured employee or his dependent family.

(4) That the said settlement of $11,250.00 is fair and equitable, has been accepted by the widow upon advice of her counsel, and that the same is herewith and hereby approved.

COMPENSATION ORDER

1. The Employer and Carrier shall pay to Claimant the sum of $11,250.00.

2. A fee of $2,264.75, including $14.75 for disbursements, is considered reasonable for legal services rendered to Claimant by Becher, Kinnel, Doucette, Mattison, and shall be paid out of the award.

/s/ Edwin S. Bernstein
Edwin S. Bernstein
Administrative Law Judge

Dated: November 19, 1973
Washington, D.C.

APPENDIX B

UNITED STATES DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
WASHINGTON, D.C. 20210

DIRECTOR, OFFICE OF WORKMEN'S COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Petitioner

vs.

S. H. DU PUI COMPANY
and
LIBERTY MUTUAL INSURANCE Co.
Respondents

DECISION OF THE BOARD
BRB No. 74-101

Before: Washington, Chairperson, Hartman and Miller, Members.

This is an appeal by the Director, Office of Workmen's Compensation Programs, from the compensation order of an administrative law judge which approved a settlement agreement between Dorothy C. Allen, the claimant, and the employer and carrier, respondents herein, arising under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. §901 *et seq.*

Claimant is the widow of an employee whose death allegedly resulted from an injury incurred while working in employment covered by this Act. Decedent, a Jehovah's Witness, accepted medical treatment but rejected blood transfusions based on religious beliefs. It was stipulated that the attending physician would testify that decedent would have made a good recovery had he

accepted these transfusions. This refusal was the basis for the respondent's controversion of the claimant's right to receive death benefits.

After the case was transferred for hearing to the Office of the Chief Administrative Law Judge, but before the date set for the hearing, respondent offered claimant the sum of $11,250.00 in settlement of her claim. Claimant was willing to accept this offer and at the scheduled hearing both parties stipulated to the facts and sum to be paid. The administrative law judge accepted these facts and sum and issued a compensation order. The order also provided that claimant's attorney's fee be paid out of this approved sum.

Petitioner asserts, among other things, that the settlement agreement amounts to a withdrawal of controversion and therefore, under 20 C.F.R. §702.351, the administrative law judge should have halted the proceedings and returned the case to the deputy commissioner for proper disposition of the case. *See* 20 C.F.R. §702.315.

The Board cannot agree with petitioner that a settlement agreement is tantamount to a withdrawal of controversion. Section 702.351, 20 C.F.R., requires that a signed statement withdrawing controversion be submitted to the administrative law judge in order to effectively withdraw one's controversion of the contested issues. Such a statement was never submitted by either party. A settlement offer by an employer is not an admission of liability or a withdrawal of controversion but is merely an expeditious method of avoiding costly litigation which may result in an unfavorable outcome. The respondents in their brief before this Board state categorically that they have not withdrawn their controversion in this case.

Nevertheless, we do find that the administrative law judge lacked authority since the compensation order, in effect, constituted approval of a lump sum settlement. Section 8(i)(A) of the Act, 33 U.S.C. §908(i)(A), gives the authority to approve settlements to the deputy commissioner. Prior to the 1972 amendments, Section 8(i)(A) allowed the deputy commissioner to approve settlements only "with the approval of the Secretary." However, the requisite approval of the Secretary was deleted in the amendments of 1972, leaving the power to approve such settlement agreements with the deputy commissioner.

The respondents urge the Board to find that the Director, Office of Workmen's Compensation Programs, is not a party adversely affected or aggrieved by a decision and therefore not entitled to appeal the administrative law judge's decision in this case. "Party in interest" is defined in 20 C.F.R. §801.2(a):

> (10) "Party" or "Party in interest" means the Secretary or his designee and any person or business entity aggrieved or directly affected by the decision or order from which an appeal to the Board is taken.

The Director is responsible for the proper administration of the Act and is "adversely affected" pursuant to 20 C.F.R. §802.201(a), whenever an administrative law judge makes an error in a legal determination under the Act.

The Board finds that the Director, Office of Workmen's Compensation Programs, is the designee of the Secretary and upholds his right to bring an appeal as a "party in interest adversely affected."

The Board vacates the order of the administrative law judge which, in effect, approved a lump sum settlement.

Accordingly, we remand the case to the administrative law judge for referral to the deputy commissioner for appropriate action pursuant to Section 8(i)(A) of the Act.

/s/ Ruth V. Washington
Ruth V. Washington, Chairperson

/s/ Ralph M. Hartman
Ralph M. Hartman, Member

/s/ Julius Miller
Julius Miller, Member

Dated this 17th day
of June 1974.

APPENDIX C

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
WASHINGTON, D.C. 20210

BRB No. 74-101
ORDER

Further consideration of the question of attorney's fee is unnecessary as the compensation order of the administrative law judge has been vacated and that question is now before the deputy commissioner, therefore, the respondents' request for reconsideration is hereby DENIED

/s/ Ruth V. Washington
Ruth V. Washington, Chairperson

/s/ Ralph M. Hartman
Ralph M. Hartman, Member

/s/ Julius Miller
Julius Miller, Member

Dated this 10 day
of July 1974.

APPENDIX D

In the
United States Court of Appeals
For the Seventh Circuit

No. 74-1666

S.H. DU PUY and LIBERTY MUTUAL INSURANCE COMPANY,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

Petition for Review of an Order of
the Benefits Review Board
United States Department of Labor

ARGUED APRIL 7, 1975 — DECIDED AUGUST 7, 1975

Before PELL and SPRECHER, *Circuit Judges,* and PERRY, *Senior District Judge.**

PELL, *Circuit Judge.* Oscar Allen was severely injured on November 6, 1972, while employed by S.H. Du Puy Company (Du Puy)[1] as a grain trimmer at the Jones Island Docks in Milwaukee, Wisconsin. Allen received

* Senior District Judge Joseph Sam Perry of the Northern District of Illinois is sitting by designation.

[1] The employer was denominated as the S.H. Du Pui Company in the administrative proceedings of which review is sought in this court. Here, however, the employer is also referred to as DePui and Du Puy. There being no suggestion that any of the various designations refer to other than the one and same company and assuming that the company's counsel in its last briefing word should be in the best position to know the correct spelling, we are utilizing Du Puy.

medical attention and was hospitalized. He refused blood transfusions for religious reasons and died November 11, 1972. Liberty Mutual Insurance Co., the insurance carrier for Du Puy, gave notice that it would controvert the case since Mr. Allen refused to accept reasonable "medical treatment." Mrs. Allen made a claim for death compensation for herself by notification. A conference with Mrs. Allen, Liberty Mutual, and a deputy commissioner for the United States Secretary of Labor was held in May 1973. The deputy commissioner concluded that there was a necessity for an evidentiary hearing which "will be held by an Administrative Law Judge of the U.S. Department of Labor, who will follow the Administrative Procedure Act." The hearing was scheduled for October 1973 before the Administrative Law Judge (ALJ).

At the hearing the parties informed the ALJ that a settlement agreement had been reached. The ALJ entered an order based on this agreement, which provided for a lump sum payment. Attorney's fees were to be paid from the award. The Director, Office of Worker's Compensation Programs, Department of Labor, appealed this order to the Benefits Review Board, which vacated the Compensation Order on the grounds that a settlement could only be approved by a deputy commissioner. The board declined to rule on the question of attorney's fees raised before the board.

Du Puy and Liberty Mutual jointly petition this court pursuant to 33 U.S.C. §921(c) to set aside the decision of the Benefits Review Board and to reinstate the compensation order filed by the ALJ. In their briefs and during oral argument in this court the parties have principally addressed themselves to two issues: 1) whether the ALJ had the authority and power to approve the settlement of the death claim and 2) whether attorney's fees should have been assessed in addition to the award by the ALJ, assuming he had the power to make an award.

The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*, was enacted to provide the type of coverage generally denominated as workmen's compensation to certain designated employees of

whom Allen was one.[2] In furtherance of the protective purpose of the Act, other provisions specified that no agreement by an employee to waive his right to compensation would be valid and that no assignment, release, or commutation of compensation or benefits would be valid except as provided in the Act. 33 U.S.C. §§ 915(b), 916.[3] These sections have operated as a general bar to settlements. See generally, *Henderson* v. *Glens Falls Indemnity Co.*, 134 F.2d 320 (5th Cir. 1943), *cert. denied*, 319 U.S. 756; *Lumber Mutual Casualty Insurance Co.* v. *Locke*, 60 F.2d 35 (2d Cir. 1932).

While the underlying policy of the Act generally precluded disposition of these cases by way of compromise and settlement, Congress did provide an exception. That exception, the only one of which we are aware in the Act prior to the amendments of October 27, 1972, was contained in 33 U.S.C. § 908(i), which provided that if the deputy commissioner determined that it is for the best interests of an injured employee entitled to compensation, he could, with the approval of the Secretary of Labor, approve agreed settlements in cases involving temporary partial disability and certain cases involving permanent partial disability.[4]

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[2] "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." 33 U.S.C. § 903. This section has certain exclusions from coverage not here material.

[3] These sections of the Act, which have remained unamended since the original enactment in 1927, read as follows:

"(b) No agreement by an employee to waive his right to compensation under this chapter shall be valid." 33 U.S.C. § 915(b).

"No assignment, release, or commutation of compensation or benefits due or payable under this chapter, except as provided by this chapter, shall be valid, and such compensation and benefits shall be exempt from all claims of creditors and from levy, execution, and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived." 33 U.S.C. § 916.

[4] Specifically, the deputy commissioner's authority was limited to cases under subdivision (c)(21) and subdivision (e) of § 908. Those subdivisions, which were unchanged by the 1972 amendments, read as follows:

"(21) Other cases: In all other cases in this class of disability the compensation shall be 66 ⅔ per centum of the difference between his average weekly wages and his wage-earning capacity

In 1972, § 908(i) was amended to allow the deputy commissioner to approve agreed settlements whenever he determined that it is for the best interests of the injured employee. The reference to certain subdivisions and the reference to approval of the Secretary were eliminated.[5] The House Report accompanying the bill

[4] (Continued)

thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest."

"(e) Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years."

It is to be noted that in the case of permanent partial disability the "other cases" followed twenty specific types of injuries, and in practically all cases the amount of compensation was exactly spelled out, *e.g.*, in the case of a fourth finger lost the compensation was fifteen weeks. In the "other cases" situation, subdivision (c)(21), a factor was "wage earning capacity thereafter" which would appear to call for the determination of a judgmental figure. The same reference to "wage earning capacity after the injury" appears in subdivision (e). It would appear prior to the 1972 amendments that the deputy commissioner's discretion was basically limited to the situation where the uncertain factor of post-accident earning capacity entered the picture and that in other instances the claim was not subject to compromise or settlement but it was a matter of all or nothing.

[5] The full text of the amended subdivision is as follows:

"(i)(A) Whenever the deputy commissioner determines that it is for the best interests of an injured employee entitled to compensation, he may approve agreed settlements of the interested parties, discharging the liability of the employer for such compensation, notwithstanding the provisions of section 915(b) and section 916 of this title: *Provided*, That if the employee should die from causes other than the injury after the deputy commissioner has approved an agreed settlement as provided for herein, the sum so approved shall be payable, in the manner prescribed in this subsection, to and for the benefit of the persons enumerated in subsection (d) of this section.

(B) Whenever the Secretary determines that it is for the best interests of the injured employee entitled to medical benefits, he may approve agreed settlements of the interested parties, discharging the liability of the employer for such medical benefits, notwithstanding the provisions of section 916 of this title: *Provided*, That if the employee should die from causes other than the injury after the Secretary has approved an agreed settlement as provided for herein, the sum so approved shall be payable, in the manner prescribed in this subdivision, to and for the benefit of the persons enumerated in subdivision (d) of this section.

stated: "Subsection [90]8(i)(A) provides that the deputy commissioner. Board, or Court may approve a settlement discharging an employer from liability for compensation if he deems it to be in the best interest of the employee." H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., 3 *U.S. Code Congressional and Administrative News* at 4698, 4720 (1972).

We note one other amendment to the Act which was included in the 1972 amendments. Section 919(d) had provided for the presentation of evidence at a hearing to be conducted by the deputy commissioner as provided for in subdivisions (a) through (c) and also that the claimant and employer could be represented at the hearing by any person authorized in writing. This subdivision was amended to read as follows:

> "(d) Notwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with the provisions of section 554 of Title 5. Any such hearing shall be conducted by a hearing examiner qualified under section 3105 of that Title. All powers, duties, and responsibilities vested by this chapter, on October 27, 1972, in the deputy commissioners with respect to such hearings shall be vested in such hearing examiners."

Section 554 is the adjudication section of the Administrative Procedure Act. In addition to providing that hearings are to be held in accordance with §§ 556 and 557, section 554 provides, *inter alia*, as follows:

> "(c) The agency shall give all interested parties opportunity for —
>
> (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and
>
> (2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title."
>
> 5 U.S.C. § 554(c).

The powers and duties of a hearing examiner or an administrative law judge are set forth in Section 556 which provides in part:

> "(b) . . . . This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specifically provided for by or designated under statute. . . .
>
> "(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may —
>
> . . . .
>
> "(6) hold conferences for the settlement or simplification of issues by consent of the parties;" 5 U.S.C. 556 (b), (c).

The foregoing is the context of the issue argued vigorously both in the briefs and at oral argument of the parties and the amicus.[6] The petitioners and the amicus contend that it is clear that the hearing examiner, now administrative law judge, is to conduct the hearing and is vested in connection with the hearing not only in the Administrative Procedure Act but particularly by the Longshoremen's and Harbor Workers' Compensation Act with the "powers, duties, and responsibilities" theretofore reposing in the deputy commissioner. This would, it is asserted, perforce include the duty to pass upon agreed settlements and to approve such settlements if in the best interest of the claimant. The governmental respondent devotes equally vigorous argument to the effect that the power of approving settlements still remains solely with the deputy commissioner, and would seem to be saying that the amended section 919(d) does not mean what it rather clearly seems to say. It is obvious that all who appeared before us desired us not only to dispose of this issue but also that pertaining to the allowance of attorney fees. Scant attention was paid either in the briefs or at oral argument to a footnote in the respondent's brief, which upon further analysis

[6] The court permitted the West Gulf Maritime Association to file a brief and to participate in oral argument on an amicus curiae basis. That Association supported the position of the petitioners.

we hold to be dispositive of the case before us.[7] The footnote states the matter sufficiently succinctly and, in our opinion, so correctly that we set it forth as a part of this opinion:

> "The language and legislative history of section 8 (i)(A), as originally enacted, Act of June 25, 1938, C. 685, § 5, 52 Stat. 1165, and as amended, raise doubts that any proposed settlement of a death claim, such as in the instant case, can be approved even by a deputy commissioner. Section 8(i)(A) both before and after the 1972 Amendments to the Act, P.L. 92-576, 86 Stat. 1251, requires that the proposed settlement be in the 'best interest of the *injured employee.*' That Congress intended to limit this statutory authorization of settlements to the claims of the 'injured employee' is clear. As originally enacted, approved settlements were limited to cases which came within sections 8(c)(21) and 8(e), 33 U.S.C. 908(c)(21) and 908(e), *i.e.*, cases of permanent partial disability and temporary partial disability. The very language of section 8(i)(A), as originally enacted, therefore, did not authorize the settlement of death claims.
>
> "Although section 20(a) of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 86 Stat. 1251, 1264, which amended section 8(i), no longer limits approval of settlement to cases coming within sections 8(c)(21) and 8(e), amended section 8(i)(A) retains the requirement that the settlement be in 'the best interests of the injured employee.' Had Congress intended to permit the settlement of all claims coming within the provisions of the Act, including claims for death benefits, Congress could have substituted the phrase best interest of the 'person entitled to compensation' for 'best interest of the injured employee.' *Compare* section 14(j), 33 U.S.C. 914(j), which authorizes the deputy commissioner to approve the lump sum payment and commutation of an award. In calculating the com-

[7] While we ordinarily would not have devoted the space that we have to a non-dispositive issue, we have deemed it necessary in the present instance for the purpose of showing the statutory background in which any claimant in the workmen's compensation area must operate.

> mutation the deputy commissioner is directed to consider 'The probability of the death of the injured employee or *other persons entitled to compensation.*' 33 U.S.C. 914(j).
>
> "In view of the foregoing, it is doubtful that either an administrative law judge or a deputy commissioner can approve the proposed settlement in this case and the question presented to this Court in this appeal may be merely academic." [Emphasis in the original.]

If the petitioners and amicus have a refutation of what was expressed as a doubt by the respondent, it was not provided to us. While the ALJ may well have the power to approve a settlement agreement in the case of an injured employee, we do not have such a case here. We are dealing with a claimant who became such by virtue of the death of an employee. Her case is not lodged under section 908 but under section 909. That section is silent on the matter of settlement. The amendment of 908, despite being included in the section relating to injured employees, might have been broadened to include all claimants, but it did not do so. Subdivision (i) still only relates to "an injured employee."

It is not difficult to conceive of many policy arguments which favor at least someone having the authority to approve an agreed settlement of the claim of a person entitled under section 909. In the particular case before us, the widow, who was represented by apparently competent counsel of her own choice, agreed to a settlement for a lump sum which would have netted her approximately $9,000.00. The decision to settle was made in the light of medical support for the belief that the employee would not have died if he and his family, including the claimant, had been willing to permit a blood transfusion. The total settlement would have been more than half of the amount that would have been reached based upon the decedent's life expectancy. The claimant's life expectancy was less than normal. Yet, apparently as the statutory scheme stands, she and all similar claimants are remitted to a roll of the dice, an all or nothing situation: and nearly three years after the death of her husband her claim is still pending.

Further, general policy is in favor of settlement of litigation by compromise and settlement procedures. See the discussion of the general policy by Judge Sprecher in speaking for this court in *Clarion Corporation* v. *American Home Products Corporation,* 494 F.2d 860, 863 (7th Cir. 1974), *cert. denied,* 419 U.S. 870.

It is not our province, however, to write legislation that Congress either overlooked or designedly chose not to write; *a fortiori,* this is true where the rights of all claimants, direct or derivative, are so specifically dependent upon, and pursuant to, precise statutory limitations as is the case in the law of workmen's compensation. The hornbook law in this area is set forth in the caption notes of 100 C.J.S. Workmen's Compensation § 406 (1958): ". . . . Generally an agreement as to compensation must be approved by a court, board, or commission. . . . A court or commission has only such power to approve agreements as is conferred by statute, and has no power to approve an agreement which does not conform to the statute. . . . There should be a compliance with statutory requirements in proceedings for approval of compensation agreements."

Therefore, we reluctantly conclude that neither the deputy commissioner nor the ALJ had authority to approve the settlement. We can conceive of no reason for Congress not giving the power to a responsible administrative agency. Thus far, however, it has not.

Because of our decision on the first issue, we do not determine whether attorney fees should be allowed in addition to an award or should come from the award.

For the reasons hereinbefore set out, we hold that the Benefits Review Board action in vacating the order of the ALJ was correct, although not for the reasons given by the Board, the correctness of which we have not had to determine. Accordingly, we deny the petition to set aside the Board decision.

SPRECHER, *Circuit Judge*, concurring. I concur in the result but not in the statements in the majority opinion which are not necessary to reach the result.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

September 3, 1975

Before

Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. JOSEPH SAM PERRY, Senior District Judge*

S. H. DU PUI and LIBERTY MUTUAL INSURANCE COMPANY, Petitioners,		
No. 74-1666	vs.	Petition for Review of an Order of the Benefits Review Board, United States Department of Labor
DIRECTOR, OFFICE OF WORKMEN'S COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Respondent.		

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be, and the same is hereby, DENIED.

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* Senior District Judge Joseph Sam Perry of the Northern District of Illinois is sitting by designation.

APPENDIX F

33 U.S.C. §908(i)(A) as amended, Oct. 27, 1972, Pub. L. 92-576 §20(a), 86 Stat. 1264

§908 COMPENSATION FOR DISABILITY

(i)(A) Whenever the deputy commissioner determines that it is for the best interests of an injured employee entitled to compensation, he may approve agreed settlements of the interested parties, discharging the liability of the employer for such compensation, notwithstanding the provisions of section 915(b) and section 916 of this title: PROVIDED, That if the employee should die from causes other than the injury after the deputy commissioner has approved an agreed settlement as provided for herein, the sum so approved shall be payable, in the manner prescribed in this subsection, to and for the benefit of the persons enumerated in subsection (d) of this section.

33 U.S.C. §919(d) as amended, Oct. 27, 1972, Pub. L. 92-576 §14, 86 Stat. 1261

§919 PROCEDURE IN RESPECT OF CLAIMS

(d) Notwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with the provisions of section 554 of Title 5. Any such hearing shall be conducted by a hearing examiner qualified under section 3105 of that Title. All powers, duties, and responsibilities vested by this chapter, on October 27, 1972, in the deputy commissioners with respect to such hearings shall be vested in such hearing examiners.

33 U.S.C. §928(a), as amended, Oct. 27, 1972, Pub. L. 92-576, §13, 86 Stat. 1259

§928 FEES FOR SERVICES — ATTORNEY'S FEE; SUCCESSFUL PROSECUTION OF CLAIM.

(a) If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this chapter, and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner, Board, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.